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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. ~~[illegible]~~ 20

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

PETITION FOR A WRIT OF CERTIORARI TO THE SPECIAL COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT OF PETITION.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Petitioner.

(33,927)

SUBJECT INDEX.

	Page
PETITION FOR A WRIT OF CERTIORARI	1
Summary Statement of the Matter Involved	1
Reasons Relied on for the Allowance of the Writ	4
Prayer for Writ	5
BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	7
I. The Opinions of the Courts Below	7
II. Jurisdiction	8
III. Statement of the Case	9
IV. Specification of Errors	9
V. Argument	10
Summary of Argument	10
Point A. There is no Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed	10
Point B. There is no Valid Distinction between the Case at Bar and the Brooke Case	14
Point C. The Ownership of Petitioner's *cestuis* Cannot of Itself Create Jurisdiction	16
CONCLUSION	20
APPENDIX	21

TABLE OF CASES CITED.

	Page
Att'y-Gen. v. *Power*, (1906) 2 I. R. 272, K. B. D.	17
Bowe v. *Scott*, 233 U. S. 658	9
Brooke v. *Norfolk*, 277 U. S. 27 (Appendix)	21
Buck v. *Beach*, 206 U. S. 392	15
Bullen v. *Wisconsin*, 240 U. S. 625	12
Grannis v. *Ordean*, 234 U. S. 385	9
Frick v. *Pennsylvania*, 268 U. S. 473	15
State Tax on Foreign-Held Bonds, 15 Wall. 300	14
Sullivan v. *Texas*, 207 U. S. 416	9
Wachovia v. *Doughton*, 272 U. S. 567	16

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

PETITION FOR WRIT OF CERTIORARI.

May it Please the Court:

The petition of Safe Deposit and Trust Company of Baltimore, Maryland, Appellant in the above styled cause, the same having been duly docketed on January 9th, 1929, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

These proceedings arise out of an attempt on the part of Virginia to assess for taxation certain intangible

property held in Maryland. The only estate in the said property belonging to citizens or residents of Virginia is particular and contingent and carries with it no present enjoyment, no certain right of future enjoyment, and no possession or control of the *corpus*.

The assessment is therefore a bare proposition to tax an interest to which there is no citizen of Virginia who is not a stranger.

The facts are as follows:

On May 4th, 1920, one Lucius J. Kellam, domiciled and residing in Virginia (R. 3), executed a deed of trust (R. 5) by which he transferred to Petitioner certain securities, listed in a schedule attached to the deed (R. 7), and valued at approximately $50,000.00. The said securities were accordingly delivered to Petitioner, and were accepted, and are held by it at its place of business in Baltimore upon the following trusts (R. 6):

> "To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by

said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

No provision is made for the event of the death of *both* sons under twenty-five, without issue.

There is reserved to the grantor a full right of revocation. Power is given the Petitioner to cause the securities to be registered in its own name to facilitate reinvestment; but it is required to obtain the grantor's approval before making any change (R. 6 & 7).

Three months after executing this instrument, Kellam died; the trust remaining unrevoked (R. 2, 4). His two sons continue to reside in Accomac County, Virginia (R. 3).

Except insofar as they may have been changed by reinvestment, the securities have remained in Petitioner's possession in Baltimore (R. 4), where they have been regularly listed for taxation, and all state and city taxes paid (R. 5).

The Commonwealth of Virginia having also assessed state taxes against the property, Petitioner applied for relief to the Circuit Court for Accomac County (R. 1). At this time neither of the grantor's sons had died or attained the age of twenty-five years (R. 1, 2, 6). The

application was refused, the court holding the *corpus* taxable in Virginia (R. 3), and the assessment consequently proper.

The assessments of the same property against Trust Company of Norfolk (a Virginia corporation) stricken out by the Circuit Court (R. 3), and against Carrie P. Kellam, mother and guardian of the two children, stricken out by the Special Court of Appeals in its first opinion on appeal from the Circuit Court (R. 18) are immaterial to the question now before your Honors.

Petitioner having appealed as aforesaid to the Special Court of Appeals of Virginia, which was the highest court in which a decision might be had, the judgment of the Accomac Court, that Petitioner must pay the state taxes assessed against it on the property, was affirmed (R. 18) on March 1st, 1928.

Petitioner then applied for and obtained a rehearing. It was granted (R. 20) on the stated ground (R. 21) that the constitutional point expressly raised in the petition (R. 19, 20), was of sufficient gravity to warrant judicial consideration although raised for the first time on rehearing. On October 30th, 1928, the Special Court delivered its second opinion (R. 21), deciding the constitutional question adversely to Petitioner (R. 29).

On December 15th, 1928, an appeal was allowed Petitioner to the Supreme Court of the United States (R. 33), where the case was docketed on January 9th, 1929.

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. Neither Petitioner's *cestuis que trustent* nor any one else residing and domiciled in the State of Virginia

owns or has any control over the *corpus* of the trust fund hereinabove described or has any present, or any certain future, right of ever enjoying the same.

2. The fund has therefore no taxable *situs* in Virginia.

3. The assessment against the said fund is therefore unconstitutional and void in that it deprives Petitioner of its property without due process of law.

4. In holding to the contrary the Special Court of Appeals of Virginia has decided a federal question of substance in a way not in accord with the applicable decisions of the Supreme Court of the United States.

WHEREFORE your Petitioner prays that the papers, wherein an appeal was heretofore allowed to this Court from the judgment of the Special Court of Appeals of Virginia in a case entitled on its docket, Safe Deposit & Trust Company of Baltimore, Maryland, Appellant, v. Commonwealth of Virginia, Appellee, be regarded and acted on a petition for certiorari and as if duly presented to this Court at the time the said appeal was allowed, that a writ of certiorari be issued out of and under the seal of this Court directed to the said Special Court of Appeals of Virginia and that the judgment of the said Court may be reversed by this Honorable Court and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

And your Petitioner will ever pray, etc.

SAFE DEPOSIT AND TRUST COMPANY
OF BALTIMORE, MARYLAND,

By:

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT-PETITIONER,

vs.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The first opinion of the Special Court of Appeals of Virginia (R. 9), was rendered on March 1st, 1928, and will not, it is believed, be officially reported, having been superseded by—

The final opinion of the said Special Court of Appeals (R. 21) rendered on rehearing on October 30th, 1928, and not yet officially reported. It is to be found in 145 S. E. 326, and will doubtless appear in 151 Va. under the style of *Trust Company of Norfolk, et al., v. Commonwealth.*

II.

JURISDICTION.

1. Acts, February 13, 1925, c. 229, sec. 1 (b), (c), 43 Stat. 938, (U. S. C., Tit. 28, Judicial Code and Judiciary, sec. 344, par. [b] & [c]).

2. The judgment sought to be reviewed was rendered on October 30th, 1928 (R. 21, 30).

Appellant-Petitioner's petition for an appeal to this Court was presented to, and allowed by, the President of the Special Court of Appeals of Virginia on December 15th, 1928 (R. 33, 34), and the case was docketed January 9th, 1929.

3. *First,* as to the time of raising the constitutional question:

Petitioner's right, title, immunity and privilege were specially set up and claimed in its petition to the Special Court of Appeals for rehearing (R. 19, 20). The question was considered by the Court (R. 21)—the highest in which a decision might be had—and was decided by it adversely to Petitioner's contention (R. 29, 30).

Second, as to the nature of the case:

Petitioner as trustee under the Kellam deed (R. 6) holds at its place of business in Maryland (R. 4) the physical evidences of the intangible property (R. 7) sought to be taxed by the State of Virginia. The said *corpus* has therefore no taxable *situs* in Virginia unless by virtue of the residence within her borders of the owner or owners thereof. But neither Petitioner's *cestuis que trustent,* nor their issue (unborn), nor any person who may take in default of the said *cestuis* or of their issue (unborn) "own" that *corpus,* since such persons have neither possession nor control thereof, nor, indeed, have they a present right, nor any certain future

right, to the usufruct (R. 5-7). The tax is imposed therefore on a *corpus* (R. 3) over which the State of Virginia has no jurisdiction and is consequently in contravention of the 14th Amendment of the United States Constitution. Petitioner, therefore, being deprived of its property without due process of law, was by the judgment sought to be reviewed (R. 21-30) denied a right, title, immunity and privilege pertaining to it by virtue of section One of the said Fourteenth Amendment.

4. *First*, as to the time of raising the constitutional question:

Sullivan v. *Texas*, 207 U. S. 416, 422;
Bowe v. *Scott*, 233 U. S. 658, 663;
Grannis v. *Ordean*, 234 U. S. 385, 392.

Second, as to the nature of the case:

Brooke v. *Norfolk*, 277 U. S. 27.

III.

STATEMENT OF THE CASE.

(In the interest of brevity the statement of the case set out under A of the accompanying Petition is not repeated here except by reference.)

IV.

SPECIFICATION OF ERRORS.

1. The Special Court of Appeals of Virginia erred in holding that the residence within that State of persons, bearing to the intangibles held by Petitioner such jural relationship as is created by the deed of trust here involved, was sufficient under the due process clause of

the Federal Constitution to create in Virginia a taxable *situs* for the said property, the physical evidences thereof being held in Maryland.

2. The Special Court of Appeals of Virginia consequently erred in holding that the said assessment (and the tax imposed thereunder) was constitutional and valid.

V.

ARGUMENT.

SUMMARY.

A. There is No Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed.

B. There is No Valid Distinction Between the Case at Bar and the BROOKE Case.

C. The Ownership of Petitioner's Cestuis Cannot of Itself Create Jurisdiction.

A.

THERE IS NO OWNERSHIP IN VIRGINIA COMMENSURATE WITH THE (ABSOLUTE) ESTATE ACTUALLY TAXED.

In this case the Commonwealth of Virginia has assessed a tax against the whole of the fund held by Petitioner as Trustee under the deed executed by Kellam (R., 5). We take it to be undisputed by counsel for the Commonwealth that no greater tax would have been imposed had an identical set of securities been held in absolute estate by a resident of Richmond, Virginia, in his safe-deposit box in a Richmond bank. Certainly, such an inference is inescapable not only from the terms of the judgment of the trial court (R., 3), but also from

the final opinion of the Special Court of Appeals (R., 29).

The tax, it is true, is assessed against Petitioner, the holder of the legal title to the particular estate. It surely, however, cannot be contended that the mere accident of Petitioner's appearance before a Virginia tribunal can justify the taxation of the corpus of a fund held in Maryland, when Petitioner neither resides in Virginia nor is acting in any fiduciary capacity under the supervision of a Virginia Court (R., 2).

No such theory as the foregoing could suffice, we submit, to support the tax imposed in the instant case. On the contrary, from the opinion recently handed down by this Court in the case of *Brooke* v. *Norfolk*, 277 U. S. 27 (for convenience of reference fully set out in an appendix hereto) the true rule seems clear, namely, that a State has power to tax intangibles held without its borders *to the extent only of such interest therein as may belong to a resident of the State.*

The inquiry here, then, is what interest in the fund assessed is owned by residents of Virginia? Obviously, the owners of the largest share are Petitioner's *cestuis*, but although their interest may be technically a fee defeasible, it is certainly not the entirety.* That this is

*See *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where beneficiaries of a trust in which the grantor had reserved a right of revocation claimed that a succession tax imposed upon the death of the grantor was unconstitutional for the reason that their interest had vested before his death and the reserved power was a mere condition subsequent. Yet it was held that the possible defeasance was real enough to justify the tax on the succession. In the instant case, the interests attendant upon defeasance seem equally real and therefore cannot be neglected in computing the totality of the estate.

so is incontrovertibly shown by the following simple test: Assume the disabilities of nonage removed, so that the *cestuis* could validly bind themselves to part with their interest, could they, or either of them, obtain for it the value actually taxed? Obviously not, because any purchaser would unquestionably estimate the probability of a defeasance and reduce accordingly the amount he would be willing to pay. In other words, neither *cestui* can sell the remainder, or whatever estate depends upon his death before 25, since such estate is owned by others, amongst whom are his brother and his own issue (now unborn). We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the *cestuis* interest. This, however, she has not seen fit to do since she has not indeed, provided any machinery for ascertaining such value; but has instead taxed the entirety (R., 3).

Still another interest is owned by the grantor's estate, as representing such persons as may take in event both *cestuis* die without issue and under twenty-five years of age. The contingency is not provided for (R., 6, 13) in the trust, and the Record is, of course, silent as to the place of residence of these persons, if they exist or are identifiable. Whoever they are, or wherever they may be, it is clear that their interest is a mere reversion, if we may speak by analogy with the law of real property, and, as such, is far from entire.

The argument used in the final opinion of the Special Court makes it necessary to consider the grantor's estate in another aspect, namely, as standing in the place of the grantor. That, as such, it can claim no ownership is established by the case of *Bullen* v. *Wisconsin,* 240 U. S. 625, since the trust in the instant case became irrevocable upon the senior Kellam's death. No resident ownership can therefore be predicated upon the fact that his administration took place in Virginia.

The interests belonging to the *cestuis* when added to those belonging to the estate fall short of totality by the extent of the interest belonging to the *cestuis'* issue, whom we may with complete confidence assume to have been yet *in futuro* at the time of the institution of these proceedings, as the two boys were then 14½ and 11 years old, respectively (R., 6).

If, therefore, the entire *corpus*, or the absolute estate, is taxable to Petitioner in Virginia, it cannot be because Petitioner's *cestuis* reside here, since they do not own it. Neither can it be because the Kellam Estate was administered in Virginia, since it does not own the *corpus*. Nor do all three together own the *corpus*. In order, therefore, to sustain the jurisdiction of this Commonwealth, she must show residence within her borders of persons yet unborn, persons whose interests, however contingent and remote, are absolutely essential to the totality of that complete and absolute estate which has been actually taxed. Thus expressed, the contention of counsel for the Commonwealth seems to carry its own refutation. We have naturally been unable to find any cases bearing on the *situs* for taxation of interests contingently belonging to persons not *in esse;* but no authority seems necessary to establish the proposition that taxable *situs* does not follow hypothetical persons, who *ex hypothesi* are incapable of having a residence or of being assessed with a tax.

(In passing we may notice the fact that the unborn children of Petitioner's *cestuis* are in no way represented by the grantor's estate. They take solely as purchasers under the trust deed, and their claims will of course be hostile to the reversioners who *are* represented by the estate.)

The contingent interests just discussed would therefore seem to have no *situs* apart from the securities themselves, and the securities are in Maryland, not Virginia. In other words, so far as concerns these con-

tingent interests, there is no "person for the movables to follow".

From the foregoing we respectfully conclude that under the doctrine of the *Brooke* case, *supra*, there is no ownership in Virginia except that of Petitioner's *cestuis* and that of the Kellam Estate, and, taken separately or together, these fall short of being commensurate with the entire interest that has been taxed. The assessment is therefore unconstitutional and void.

B.

THERE IS NO VALID DISTINCTION BETWEEN THE CASE AT BAR AND THE BROOKE CASE.

Lest some point be made of it by counsel for the Commonwealth it may be well to advert here to a difference between the facts of the *Brooke* case, *supra*, and of that at bar. In both, the fund is kept outside Virginia, but in the *Brooke* case it was never in Virginia, and furthermore, the instrument creating it was executed outside the State. In this case, however, both the creation and the origin of the trust fund were intra-state. The distinction, we submit, is more apparent than real. Any theory that would support a tax in the instant case on the ground that the property taxed was once in Virginia must, we conceive, be based on a misconception of State power and jurisdiction.

In the opinion of Mr. Justice Field in *State Tax on Foreign Held Bonds*, 15 Wall. 300, it is said:

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State."

See also the opinion of Mr. Justice Van Devanter, in *Frick* v. *Pennsylvania*, 268 U. S. 473, 492:

> "These decisions show, first, that the exaction by a State of a tax which it is without power to impose is a taking of property without due process of law. * * * ."

Now, "jurisdiction" and "power to impose" are questions, not of motive, but of fact. Their existence does not depend on the intentions of the person whose object it may be to escape them. Either the property is within the jurisdiction or it is not. Can a tax upon it be justified by a retrospective view of why it is where it is? Surely not. If M, a resident of Virginia, believing his taxes too burdensome and desiring to escape them, removes himself and all his property to another State, could this Commonwealth (assuming she in some way obtained a temporary jurisdiction of his person) impose a tax on his property? Surely not. Yet any theory involving origin as a criterion would justify a tax in that case.

Analogous is the holding of *Buck* v. *Beach*, 206 U. S. 392, 402, where it is said:

> "But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, was there any property within the jurisdiction of the State of Indiana, so as to permit that State to tax it, simply because of the presence of the Ohio notes in that State?"

C.

THE OWNERSHIP OF PETITIONER'S CESTUIS CANNOT OF ITSELF CREATE JURISDICTION.

Since in the opinion of the Special Court of Appeals of Virginia (R. 28) the position is taken that the ownership of Petitioner's *cestuis* alone is sufficient to confer jurisdiction upon this Commonwealth, it may be proper to consider the question from the point of view occupied by that court. We have endeavored to show in the first section of this argument that no matter whether the *cestuis* have a mere remainder interest or a defeasible fee such interest as they have is not entire since in any event it does not include the interest of their possible unborn children.

We now, however, respectfully propose to show that Petitioner's *cestuis* are not, from the constitutional point of view, the owners of the fund in any sense of the term. A reference to the three recent cases on ownership and *situs* decided by this Court will make it plain that ownership involves possession or control or the immediate right to either of them. Thus in *Bullen* v. *Wisconsin, supra,* the decedent was held to be the owner of the property taxed because he could at any time before the moment of his death bring it within his absolute and immediate dominion. But in *Wachovia* v. *Doughton,* 272 U. S. 567, although the decedent had, in a foreign trust fund, "the life interest and the power to dispose of the remainder by a will which she could bind herself to make", yet the fund was nevertheless held to have no actual or constructive *situs* in the State which sought to impose the tax. And in *Brooke* v. *Norfolk, supra,* Mrs. Brooke had the full right of enjoyment for life, yet was not the owner. Surely, therefore, where, as in the present case, Petitioner's *cestuis* suffer a further diminution of proprietorship in that they do not now, and may

never, receive any income from the fund, there is no ownership within the meaning of the three cases just cited.

A very interesting case is *Att'y.-Gen.* v. *Power*, [1906] 2 I. R. 272, K. B. D., the appositeness of which to the present discussion will require no comment. We regret that the complicated terms of the trust involved make a short summary impossible. The facts were that by a certain marriage settlement it was provided that after the death of the surviving spouse the lands concerned should be held upon trusts substantially as follows: for the benefit of the children of the marriage and their heirs forever as tenants in common, but if any of the said children should die under 21, then his original share as well as any shares accrued him by virtue of this limitation should be held for the benefit of the survivors and their heirs as before, provided that, so long as any child should remain under age, the trustees should, after applying to the maintenance of such child a suitable sum, retain the residue of the income, invest the same and accumulate the proceeds in trust for such child if he attain 21, or if not, for such persons as should under the terms of the settlement ultimately become indefeasibly entitled. One son, Hubert, survived his parents and died under age. Of the other two sons, one became of age before Hubert's death, the other after, but both before this case arose.

The question was whether the property passing to them under the settlement was liable to estate duty upon Hubert's death.

Held, it was not so liable.

After stating the question for decision: "Was the estate of the deceased in the lands an interest in possession at his death?" or "Did Hubert, under the trusts, take a beneficial interest in the lands, which ceased on his death, within the meaning of Section 2 (6), and Section 5, sub-section 3?", Palles, C. B., went on to say:

"The principle of *In re* Bowlby (1904), 2 Ch. 685, is more in point, although that case was antithetical to the present. The judgments there very markedly show the distinction in the ownership of the surplus, after payment of maintenance, of the interest, during minority, on a legacy to a child, between the cases, on the one hand, of the legacy being vested, and, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents and profits until Hubert's death were captured by the trusts, and the surplus income after payment of maintenance, instead of being the property of the child in any event, formed an accretion to the estate, and went with it to the present defendants. Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possession, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interests of the trustees, but as maintenance *eo nomine*, out of the express trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a transaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substantially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act. For this reason, I think well worthy of consideration Mr. Ronan's argument that the beneficial estates which the children took under the settlement are identical with those they would have had, had the estates been limited to the use of the trustees and their heirs in trust, in the specified event, for such children of the marriage as being sons should attain twenty-one, or being daughters should attain that age or marry, or who, whether sons or daughters, should die under twenty-one, leaving issue living at his or her death, with such a provision for maintenance as is here, or without it, in which event a substantially similar provision would have been implied by the Conveyancing Act. In such a case, would estate duty be payable on the death of a child who died without having attained a vested interest in the estate? I understood the Attorney-General to admit—and I think he was right—that it would not. What is the difference in substance between that case and the present? I confess that I cannot see any."

We respectfully conclude that the ownership pertaining to Petitioner's *cestuis* will not support the tax.

CONCLUSION.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers, in order that the right, title, privilege and immunity under the 14th Amendment of the Constitution of the United States, denied to Petitioner by the decision of the Special Court of Appeals of Virginia in this cause, should be restored to it, and that to such an end a writ of *certiorari* should be granted and this Court should review the decision of the said Special Court of Appeals of Virginia and finally reverse it.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Petitioner.

APPENDIX.

Brooke v. *City of Norfolk, et als.*, 277 U. S. 27.

(April 23, 1928.)

Mr. Justice Holmes delivered the opinion of the Court.

The Petitioner applied in the local form of proceeding for the correction of two assessments for taxation alleged to be erroneous and contrary to the Fourteenth Amendment. The court of first instance, the Corporation Court of the City of Norfolk, upheld both assessments as valid, and the Supreme Court of Virginia rejected a petition for a writ of error on the ground that the judgment below was plainly right. A writ of *certiorari* was granted by this Court. 274 U. S. 734.

The assessments complained of were for City and State taxes upon the corpus of a trust fund created by the will of a citizen of Maryland resident in Baltimore at the time of her death. This will bequeathed to the Safe Deposit and Trust Company of Baltimore eighty thousand dollars in trust to pay the income to the petitioner for life, then to her daughters for their lives, upon the death of the last survivor, to divide the principal between the descendants then living of the daughters *per stirpes*. The will was proved in Maryland, and in 1914 was admitted to probate in the Corporation Court of Norfolk as a foreign will. The property held in trust has remained in Maryland and no part of it is or ever has been in Virginia.

The petitioner has paid without question a tax upon the income received by her. But the doctrine contended for now is that the petitioner is chargeable as if she owned the whole. No doubt in the case of tangible property lying within the State and subject to a paramount

lien for taxes, the occupant actually using it may be made personally liable. *Illinois Central R. R. Co.* v. *Kentucky*, 218 U. S. 551, 562; *Carstairs* v. *Cochran*, 193 U. S. 10, 16. But here the property is not within the State, does not belong to the petitioner and is not within her possession or control. The assessment is a bare proposition to make the petitioner pay upon an interest to which she is a stranger. This cannot be done. See *Wachovia Bank and Trust Co.* v. *Doughton*, 272 U. S. 567, 575.

Judgment reversed.

FILE COPY

MAR 3

BRIEF FOR APPELLANT.

Supreme Court of the United States

OCTOBER TERM, 1933

No. 420

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
Appellant,

v.

THE COMMONWEALTH OF VIRGINIA, Appellee.

Appeal from the Supreme Court of Appeals of the Commonwealth of Virginia.

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SUBJECT INDEX.

	Page
I. THE OPINIONS OF THE COURT BELOW	1
II. JURISDICTION	2
III. STATEMENT OF THE CASE	3,8
IV. SPECIFICATION OF ERRORS	8
V. ARGUMENT	8
Summary of Argument	8-9
Point A. Under the Doctrine of the Brooke Case, a State has Power to Tax Intangibles held without its Borders only so far as the same may be Owned by a Resident, and Under the Facts of this Case there is no Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed	9-13
Point B. The Brooke Case cannot be Validly Distinguished from the Case at Bar on the Ground that the Several Trust Funds had Different Territorial Origins	13-14
Point C. The Interest of Appellant's Cestuis when Particularly Considered Discloses Lack of Ownership	15-19
CONCLUSION	19
APPENDIX	20

THE QUESTIONED STATUTE.

Acts, 1923, ch. 104, (§2307, Va. Code, 1919) 2, 3, 6, 7, 8, 13, 19, 20

THE JURISDICTIONAL STATUTES.

Act, February 13, 1925 2
Act, January 31, 1928 2
Act, April 26, 1928 2

TABLE OF CASES CITED.

Att'y-Gen. v. *Power*, [1906] 2 I. R. 272, K. B. D. 16–18
Bowe v. *Scott*, 233 U. S. 658 7
Brooke v. *Norfolk*, 277 U. S. 27 . . . . . 9, 10, 12, 13, 15
Buck v. *Beach*, 206 U. S. 392 14
Bullen v. *Wisconsin*, 240 U. S. 625 . . . . . 11, 15
Cudahy Packing Co. v. *Parramore*, 263 U. S. 418 7
Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282 7
Dewey v. *Des Moines*, 173 U. S. 193 10
Fiske v. *Kansas*, 274 U. S. 380 7
Frick v. *Pennsylvania*, 268 U. S. 473 13
Grannis v. *Ordean*, 234 U. S. 385 7
Kansas, etc., Co. v. *Arkansas*, 269 U. S. 148 7
Saltonstall v. *Saltonstall*, 276 U. S. 260 10
State Tax on Foreign-Held Bonds, 15 Wall. 300 13
Sullivan v. *Texas*, 207 U. S. 416 7
Wachovia, etc., Co. v. *Doughton*, 272 U. S. 567 . . . . . 7, 15

Supreme Court of the United States

OCTOBER TERM, 1928.

No. 618.

SAFE DEPOSIT AND TRUST COMPANY OF BALTIMORE, MARYLAND,
APPELLANT,

v.

THE COMMONWEALTH OF VIRGINIA, APPELLEE.

BRIEF ON BEHALF OF APPELLANT.

I.

THE OPINIONS OF THE COURT BELOW.

The first opinion of the Special Court of Appeals of Virginia (R. 9), was rendered on March 1st, 1928, and, it is believed, will not be officially reported, having been superseded by—

The final opinion of the said Special Court of Appeals (R. 21) rendered on rehearing on October 30th, 1928, and not yet officially reported. It is to be found in 145 S. E. at page 326, and will doubtless appear in 151 Va. under the style of *Trust Company of Norfolk, et al., v. Commonwealth.*

II.

JURISDICTION.

1. *Basis quoad the Statutes.*

Act, Feb. 13, 1925, c. 229, §237 (a), 43 Stat. 937, (U. S. C., Tit. 28, Judicial Code and Judiciary, §344, par. [a]).

Act, Jan. 31, 1928, c. 14, §1, 45 Stat. 54; Act, Apr. 26, 1928, c. 440, 45 Stat. 466, (U. S. C., Tit. 28, Judicial Code & Judiciary, §§861-1 and 861-2).

2. *Basis quoad Timeliness.*

The judgment appealed from was rendered on October 30th, 1928, (R. 21, 30).

Appellant's petition for an appeal to this Court was presented to, and allowed by, the President of the Special Court of Appeals of Virginia on December 15th, 1928 (R. 33, 34), and the papers in the Appeal were filed in this Court on January 9th, 1929 (R. 36).

3. *Basis quoad the Facts.*

First, with respect to the time of raising the constitutional question:

In its Petition for Rehearing addressed to the Special Court of Appeals (R. 18-20) Appellant expressly questioned and denied the validity—under §1 of the 14th Amendment of the United States Constitution—of Section 2307 of the Code of Virginia of 1919 (as amended) as interpreted in this case. The question

was considered by the Court, for the reason stated in the opinion on Rehearing (R. 21), and was decided adversely to Appellant's contention (R. 29, 30).

Second, with respect to the nature of the case[1]:

The applicable statute, and the general assessment law of the Commonwealth, is Section 2307 of the Code of Virginia of 1919 (R. 12). Insofar as relevant to the present litigation, it was left unchanged by the Acts of 1920[2], 1922[3], and 1923[4], the significant provisions of which last, and consequently of all three, were exhibited by Appellant with its Assignment of Error (R. 31) and are set out in the Appendix hereto (*infra,* p. 20). Most of the portions so set out concern those to whom, amongst various classes of owners and fiduciaries, property is to be assessed and taxed. *Situs* of property without the Commonwealth is fixed by the following provision:

> "If the property consists of money, bonds, stocks, or other evidence of public or private debts in any * * * State other than Virginia, it shall be listed by and taxed to the owner thereof; * * *."

The circumstances in which the said Statute was applied, and out of which this Appeal arose, were as follows:

On May 4th, 1920, one Lucius J. Kellam, a domiciled citizen and resident of Virginia (R. 3), executed a deed of trust (R. 5) by which he transferred to Appellant

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[1]In order to show that the nature of the case and the rulings of the Special Court of Appeals of Virginia are such as to create jurisdiction on appeal it will be necessary to detail the facts fully at this point.

[2]Acts of Assembly, 1920, ch. 376.

[3] *Id.,* 1922, ch. 520.

[4] *Id.,* 1923, ch. 104.

certain securities, listed in a schedule attached to the deed (R. 7), and valued at approximately $50,000.00. The said securities were accordingly delivered to Appellant, were accepted by it, and are held at its place of business in Maryland upon the following trusts (R. 6):

> "To be held by said Safe Deposit and Trust Company of Baltimore upon trust to collect the income arising therefrom and after paying such taxes as may be chargeable thereon and its 5% commissions on the gross income, to accumulate the net income for the benefit of the two sons of myself, that is to say, Lucius J. Kellam, Jr., who attained the age of eight years on September 25, 1919, and Emerson Polk Kellam, who attained the age of five years on February 5, 1920, and when the said Lucius J. Kellam, Jr., arrives at twenty-five years of age, to deliver to him one-half of the principal of the estate hereby conveyed and one-half of the said accumulations of income—the other half of the said principal and accumulations of income shall be retained by said Trustee and all income therefrom shall continue to be accumulated until the said Emerson Polk Kellam arrives at twenty-five years of age when he shall become entitled to the said one-half of the principal and accumulations so retained together with all further accumulations thereon. If either of said two sons shall die before receiving his share of said principal and accumulations, then the same shall be paid over and delivered to his children living at his death; and if either shall die before receiving his share without issue, then such share shall be added to the share of the survivor and be held for his use and benefit in the same manner precisely as his original share is held."

No provision was made for the event of the death of *both* sons under twenty-five, without issue (R. 13).

There was reserved to the donor a full right of revocation. To facilitate reinvestment, power was given Appellant to cause the securities to be registered in its own name; but it was required to obtain the donor's approval before making any change (R. 6, 7).

Three months after executing this instrument the donor died; the trust remaining unrevoked (R. 2, 4). Administration on his estate was had in Virginia (R. 2, 28) and his two sons continue to reside in Accomac County (R. 3).

Except insofar as they may have been changed by reinvestment, the securities transferred have remained in Appellant's possession in Maryland (R. 4), where they have been regularly listed for taxation, and all state and city taxes paid (R. 5).

Virginia having also assessed state taxes against the property (R. 1), Appellant had recourse to the Circuit Court for Accomac County for relief[1] (R. 1). The application was denied on the ground that the entire *corpus* was properly assessable (R. 3).

At the time of application, as is apparent from the dates given in the extract from the trust deed, *supra*, both *cestuis* were under twenty-five (R. 1) and both were alive (R. 2). It may be safely assumed, although the record nowhere explicitly so states, that they were then, and still remain, without issue.

An appeal having been taken from the Circuit Court to the Special Court of Appeals of Virginia, the highest court in which a decision might be had, the validity of

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[1]The assessments of the same property against Trust Company of Norfolk (a Virginia corporation) stricken out by the Circuit Court (R. 3), and against Carrie P. Kellam, mother and guardian of the two children, stricken out by the Special Court of Appeals in its first opinion on appeal (R. 18) are immaterial to the present question.

the Statute under the Constitution was duly questioned by Appellant, and considered and passed upon by the court, on the dates and with the results already set out (*supra*, p. 2.)

In the course of the opinion on Rehearing it was said (R. 28, 29):

> "The two sons are residents of Virginia, and administration upon the donor's estate could only take place in Virginia. *Unless the two sons are owners, or in conjunction with the personal representative of the donor's estate they constitute the owners,* then this fund has no ownership. * * *
>
> "The court is of opinion that no non-residents are owners or have any interest in the corpus of the trust fund in Baltimore; *that the present, and if essential, the ultimate owners of the property are residents of the State of Virginia;* that the assessment in this case does not require any persons to pay a tax upon intangible personal property to which they are strangers.
>
> "We are further of opinion that both the owners and the *situs* of the intangibles in question have at all times been and still are within the jurisdiction of the State of Virginia, and *therefore the assessment made in this case is not in any way violative of or repugnant to the 14th Amendment to the Constitution of the United States.* The real problem is, how the property should be assessed, and who should be required to pay the tax. In the judgment rendered by the Court this was solved by directing the trustee, who has temporary possession of the securities, to pay the tax, just as is now being done by the Norfolk trustee."

From the foregoing it is plain that what the Special Court decided was that the word "owner" appearing in the quotation from the Statute, *supra*, is correctly

interpreted when it is used to denote those[1] who bear to to the *entire corpus* of the trust fund such relationship as it borne to it by Appellant's *cestuis* and/or the donor's estate.

It is the Appellant's contention that so interpreted the Statute is void for unconstitutionality. The case is as if some statute to the effect that "all property held outside the state shall be taxed to the owner" had been construed by the lower court to mean that the Commonwealth could, despite the due process clause, tax its citizen on land owned by him and situated in another state.

4. *Cases believed to sustain the Jurisdiction.*

First, with respect to the time of raising the constitutional question:

Sullivan v. *Texas,* 207 U. S. 416, 422;
Bowe v. *Scott,* 233 U. S. 658, 663;
Grannis v. *Ordean,* 234 U. S. 385, 392.

Second, with respect to the nature of the case:

Dahnke-Walker Co. v. *Bondurant,* 257 U. S. 282, 288, 289.

Cudahy Packing Co. v. *Parramore,* 263 U. S. 418, 422.

Fiske v. *State of Kansas,* 274 U. S. 380, 385.
Kansas, etc., Co. v. *Arkansas,* 269 U. S. 148, 149;
Wachovia, etc., Co. v. *Doughton,* 272 U. S. 567, 573.

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[1] "Though the tax is assessed in the name of the trustee, the burden is in reality imposed upon the beneficial owner, a resident of the Commonwealth who enjoys the protection, etc., etc." We extract this from the first opinion (R. 14) to show that the fact that the tax was actually assessed against the Appellant is immaterial.

III.

STATEMENT OF THE CASE.

(In the interest of brevity the statement of the case set out under II, 3, of this brief (*supra*, p. 3, *et seq.*) is not repeated here except by reference.)

IV.

SPECIFICATION OF ERRORS.

The Special Court of Appeals of Virginia under the facts of this case erred in so interpreting Section 2307 of the Code of Virginia of 1919 (*or* Acts of Assembly of Virginia, 1923, ch. 104[1]) as to sustain, under §1 of the 14th Amendment of the Constitution of the United States, the validity of the said Statute and of certain taxes assessed in pursuance thereof upon the fund held by Appellant.

V.

ARGUMENT.[2]

Summary.

If the word "owner" in the Statute is correctly interpreted so as to describe, *quoad* the *entire corpus* of the fund held by Appellant's *cestuis* and/or the Kellam estate, then the Statute is unconstitutional. In other words, it is unconstitutional unless the *cestuis* and/or the estate "own" the entire *corpus*. The argument in support of the proposition may be summarized as follows:

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[1]See Appendix.

[2]In the quotations herein italics are supplied unless otherwise indicated.

A. Under the doctrine of the Brooke case, a state has power to tax intangibles held without its borders only so far as the same may be owned by a resident, and under the facts of this case there is no ownership in Virginia commensurate with the (absolute) estate actually taxed.

B. The Brooke case cannot be validly distinguished from the case at bar on the ground that the several trust funds had different territorial origins.

C. The interest of Appellant's cestuis when particularly considered discloses their lack of ownership.

A.

Under the Doctrine of the Brooke Case, a State has Power to Tax Intangibles held without its Borders only so far as the same may be Owned by a Resident, and under the Facts of this Case there is no Ownership in Virginia Commensurate with the (Absolute) Estate Actually Taxed.

In this case the Commonwealth of Virginia has assessed a tax against the whole of the fund held by Appellant as trustee under the deed executed by Kellam before his death (R. 5). We take it to be undisputed by counsel for the Commonwealth that no greater tax would have been imposed had an identical set of securities been held in absolute estate by a resident of Richmond, Virginia, in his safe-deposit box in a Richmond bank. Certainly, such an inference is inescapable not only from the terms of the judgment of the trial court (R. 3), but also from the final opinion of the Special Court of Appeals (R. 29).

The tax, it is true, is assessed against Appellant, the holder of the legal title to the particular estate. It surely, however, cannot be contended that the mere accident of Appellant's appearance before a Virginia tribunal can justify the taxation of the corpus of a fund held in Maryland, when Appellant neither resides in Virginia nor is acting in any fiduciary capacity under

the supervision of a Virginia court (R. 2). In this connection, reference is made to the note, *supra*, p. 7, and to the case of *Dewey* v. *Des Moines*, 173 U. S. 193, 203, which holds that a non-resident by resorting to a state court to obtain relief from an assessment against his property and from a personal liability therefor does not "thereby in any manner consent, or render himself liable, to a judgment against him providing for any personal liability".

No theory, therefore, based solely on Appellant's general appearance before the Circuit Court of Accomac could suffice, we submit, to support the tax imposed in the instant case. On the contrary, from the opinion recently handed down by this Court in the case of *Brooke* v. *Norfolk*, 277 U. S. 27, the true and only rule seems clear, namely, that a State has power to tax intangibles held without its borders *to the extent only of such interest therein as may belong to a resident of the State.*

The inquiry here, then, is what interest in the fund assessed is owned by residents of Virginia? Obviously, the owners of the largest share are Appellant's *cestuis*, but, though their interest may be technically a fee defeasible, it is certainly not the entirety.[1] That this is so is incontrovertibly shown by the following simple test: Assume the disabilities of nonage removed, so that the *cestuis* could validly bind themselves to part with their interest, could they, or either of them, obtain

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[1]See *Saltonstall* v. *Saltonstall*, 276 U. S. 260, where beneficiaries of a trust as to which the grantor had reserved a right of revocation claimed that a succession tax imposed upon the death of the grantor was unconstitutional for the reason that their interest had vested before his death and the reserved power was a mere condition subsequent. Yet it was held that the possible defeasance was real enough to justify the tax on the succession. In the instant case, the interests attendant upon defeasance seem equally real and therefore not to be neglected in computing the totality of the estate.

for it the value actually taxed? Obviously not, because any purchaser would unquestionably estimate the probability of a defeasance and reduce accordingly the amount he would be willing to pay. In other words, neither *cestui* can sell the remainder, or whatever estate depends upon his death before 25, since such estate is owned by others, amongst whom are his brother and his own issue (now unborn). We do not now contend that the State of Virginia could not constitutionally tax whatever may be the value of the *cestui's* interest. This, however, she has not seen fit to do (as she has not, indeed, provided any machinery for ascertaining such value); but, on the contrary, she has taxed the entirety (R. 3).

Still another interest is owned by the Kellam estate, as representing such persons as may take in event both *cestuis* die without issue and under twenty-five years of age. The contingency is not provided for (R. 6, 13) in the trust, and the record is, of course, silent as to the place of residence of these persons, if they exist or are identifiable. Whoever they are, or wherever they may be, it is clear that their interest is a mere reversion, if we may speak by analogy with the law of real property, and, as such, is far from entire.

An argument used in the final opinion of the Special Court makes it necessary to consider the Kellam estate in another aspect, *viz.*, as standing in the place of the grantor. That, as such, it can claim no ownership is established by the case of *Bullen* v. *Wisconsin*, 240 U. S. 625, since the trust in the instant case became irrevocable upon the senior Kellam's death. No resident ownership, therefore, can be predicated upon the fact that his administration took place in Virginia.

The interests belonging to both *cestuis* when added to those belonging to the estate fall short of totality by the extent of the interest belonging to the *cestuis'* issue, whom, as already stated, we may with complete confidence assume to have been yet *in futuro* at the time of

the institution of these proceedings, as the two boys were then, respectively, 14½ and 11 years old. (R. 6.)

If, therefore, the entire *corpus*, or the absolute estate, is taxable to Appellant by Virginia, it cannot be because Appellant's *cestuis* reside here, since they do not own it. Neither can it be because the Kellam estate was administered in Virginia, since it does not own the *corpus*. Nor do all three together own the *corpus*. In order, therefore, to sustain the validity of the Statute, the Commonwealth must show residence within her borders of persons yet unborn, persons whose interests, however contingent and remote, are absolutely essential to the totality of that complete and absolute estate which has been actually taxed. Thus expressed, the position of counsel for the Commonwealth seems to carry its own refutation. We have naturally been unable to find any cases bearing on the *situs* for taxation of interests contingently belonging to persons not *in esse;* but no authority seems necessary to establish the proposition that taxable *situs* does not follow hypothetical persons, who *ex hypothesi* are incapable of having a residence or of being assessed with a tax.

(In passing we may notice the fact that, unlike possible reversioners, the unborn children of Appellant's *cestuis* are in no way represented by the Kellam estate. They take solely as purchasers under the trust deed and their claims will of course be hostile to the reversioners who *are* represented by the estate.)

The contingent interests just discussed would therefore seem to have no *situs* apart from the securities themselves, and the securities are in Maryland, not Virginia. In other words, so far as concerns these contingent interests, there is no "person for the movables to follow".

From the foregoing we respectfully conclude that under the doctrine of the *Brooke* case, *supra*, there is no ownership in Virginia except that of Appellant's *cestuis*

and that of the Kellam estate, and, taken separately or together, these fall short of being commensurate with the entire interest that has been taxed. Thus there can be no constitutional owner under the Statute and the assessment is consequently unconstitutional and void.

B.

The Brooke Case cannot be Validly Distinguished from the Case at Bar on the Ground that the several Trust Funds had Different Territorial Origins.

Lest some point be made of it by counsel for the Commonwealth it may be well to advert here to a difference between the facts of the *Brooke* case, *supra*, and the facts of that at bar. In both, the fund is kept outside Virginia, but in the *Brooke* case it never was in Virginia, and furthermore, the instrument creating it was executed outside the State. In the present case, however, both the creation and the origin of the trust fund were intra-state. The distinction, we submit, is more apparent than real. Any theory that would support a tax in the instant case on the ground that the property taxed was once in Virginia must, we conceive, be based on a fundamental misconception of State power and jurisdiction.

In the opinion of Mr. Justice Field in *State Tax on Foreign Held Bonds*, 15 Wall. 300, it is said (p. 319):

> "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the *jurisdiction* of the State."

See also the opinion of Mr. Justice Van Devanter, in *Frick* v. *Pennsylvania*, 268 U. S. 473, 492:

"These decisions show, first, that the exaction by a State of a tax which it is without *power* to impose is a taking of property without due process of law. * * *."

Now, "jurisdiction" and "power to impose" a tax are questions, not of motive, but of fact. Their existence does not depend on the intentions of the person whose object it may be to escape them. Either the property is within the jurisdiction or it is not. Can a tax upon it be justified by a retrospective view of why it is where it is? Surely not. If M, a resident of Virginia, believing his taxes too burdensome and desiring to escape them, removes himself and all his property to another State, could this Commonwealth (assuming she in some way obtained a temporary jurisdiction of his person) impose a tax on his property? Surely not. Yet any theory involving origin as a criterion would justify a tax in that case.

Analogous is the holding of *Buck* v. *Beach*, 206 U. S. 392, 402, where it is said:

"But an attempt to escape proper taxation in Ohio does not confer jurisdiction to tax property asserted to be in Indiana, which really lies outside and beyond the jurisdiction of that State. Jurisdiction of the State of Indiana to tax is not conferred or strengthened by reason of the motive which may have prompted the decedent to send into the State of Indiana these evidences of debts owing him by residents of Ohio. The question still remains, was there any property within the jurisdiction of the State of Indiana, so as to permit that State to tax it, simply because of the presence of the Ohio notes in that State?"

C.

The Interest of Appellant's Cestuis when Particularly Considered discloses their lack of Ownership.

We have already endeavored to show, in subhead A hereof, that no matter whether the Appellant's *cestuis* have a mere remainder interest or a defeasible fee, such interest as they have is not entire because in any event it does not include the interest of their possible unborn children. Since, however, the position was taken in the opinion of the lower court (R. 28) that the ownership of the *cestuis* alone was sufficient to confer jurisdiction upon this Commonwealth, it may be proper to consider the question from that court's point of view.

We therefore now respectfully purpose to show that Appellant's *cestuis* are not, from the constitutional standpoint, the owners of the fund in any sense of the term. A reference to the three recent cases on ownership and *situs* decided by this Court will make it plain that ownership is not a technical conception but one that should be viewed realistically and as meaning possession or control, or the immediate right to either. Thus in *Bullen* v. *Wisconsin, supra,* the decedent was held to be the owner of the property taxed because he could at any time before the moment of his death bring it within his absolute and immediate dominion. But in *Wachovia* v. *Doughton,* 272 U. S. 567, although the decedent had, in a foreign trust fund, "the life interest and the power to dispose of the remainder by a will which she could bind herself to make", yet it was nevertheless apparently decided that the fund was not so owned by the decedent as to create for it an actual or constructive *situs* in the State which sought to impose the tax. And in *Brooke* v. *Norfolk, supra,* Mrs. Brooke had the full right of enjoyment for life, yet was not the owner. Surely, therefore, where,

as in the present case, Appellant's *cestuis* suffer a further diminution of proprietorship in that they do not now, and may never, receive any income from the fund, there is no ownership within the meaning of the three cases just cited.

A very interesting case is *Att'y.-Gen.* v. *Power*, [1906] 2 I. R. 272, K. B. D., the appositeness of which to the present discussion will require no comment, though unfortunately the complicated trust involved makes a short summary impossible. The facts were that by a certain marriage settlement it was provided that after the death of the surviving spouse the lands concerned should be held upon trusts substantially as follows: for the benefit of the childrden of the marriage and their heirs forever as tenants in common, but if any of the said children should die under 21, then his original share as well as any shares accrued him by virtue of this limitation should be held for the benefit of the survivors and their heirs as before, provided that, so long as any child should remain under age, the trustees should, after applying to the maintenance of such child a suitable sum, retain the residue of the income, invest the same and accumulate the proceeds in trust for such child if he attain 21, or if not, for such persons as should, under the terms of the settlement ultimately become indefeasibly entitled. One son, Hubert, survived his parents and died under age. Of the other two sons, one became of age before Hubert's death, the other after, but both before this case arose.

The question was whether the property passing to them under under the settlement was liable to estate duty upon Hubert's death.

Held, it was not so liable.

After stating the question for decision: "Was the estate of the deceased in the lands an interest in possession at his death?" or "Did Hubert, under the trusts, take a beneficial interest in the lands, which ceased on his death, within the meaning of Section 2

(6), and Section 5, sub-section 3?", Palles, C. B., went on say:

"The principle of *In re Bowlby*, (1904) 2 Ch. 685, is more in point, although that case was antithetical to the present. The judgments there very markedly show the distinction in the ownership of the surplus, after payment of maintenance, of the interest, during minority, on a legacy to a child, between the cases, on the one hand, of the legacy being vested, and, on the other, of the legacy being contingent, with an express direction for the child's maintenance. In the one case, the surplus is the property of the child; in the other, it forms an accretion to the capital, and does not necessarily go to the child or his representatives. The present is a correlative case. Here, although the estate is vested, subject to being divested, all the rents and profits until Hubert's death were captured by the trusts, and the surplus income after payment of maintenance, instead of being the property of the child in any event, formed an accretion to the estate, and went with it to the present defendants. Thus, the reasoning in reference to the distinction between maintenance and interest there is applicable to the distinction here between maintenance and rents and profits. Had Hubert here been entitled to the entire surplus of the rents and profits of his share, I should have held his estate was one in possession; but being, as I hold him to be, entitled to part only of that surplus, and that fluctuating, uncertain, and incapable of being defined or ascertained irrespective of its application, I must hold that his estate is not in possesion, and that such sums as he might receive for maintenance were payable to him, not by reason of his vested estate, which must be taken to be subject to the estate or interests of the trustees, but as maintenance *eo nomine*, out of the ex-

press trust for its payment to him out of the interim income of an estate, the present income of which was not his, but the trustees'.

"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a tranaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substntially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act. For this reason, I think well worthy of consideration Mr. Ronan's argument that *the beneficial estates which the children took under the settlement are identical with those they would have had, had the estates been limited to the use of the trustees and their heirs in trust, in the specified event, for such children of the marriage as being sons should attain twenty-one, or being daughters should attain that age or marry, or who, whether sons or daughters, should die under twenty-one, leaving issue living at his or her death, with such provision for maintenance as is here,* or without it, in which event a substantially similar provision would have been implied by the Conveyancing Act. In such a case, would estate duty be payable on the death of a child who died without having attained a vested interest in the estate? I understood the Attorney-General to admit—and I think he was right—that it would not. What is the difference in substance between that case and the present? I confess that I cannot see any."

The italicised part of the foregoing quotation shows the practical identity of the interest of Appellant's *cestuis* (call it a fee defeasible or not) and an ordinary contingent remainder. Reflection will show that the feature of accumulation is largely responsible for the similarity. Surely the owner of a contingency should not be taxable as if he owned the whole.

We respectfully conclude that the ownership pertaining to Appellant's *cestuis* in their own right will not support the constitutionality of the Statute.

CONCLUSION.

WHEREFORE, it is respectfully submitted that, for the error herein assigned, the aforesaid judgment of the Special Court of Appeals of Virginia should be reversed, and judgment entered for the Appellant.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
LITTLETON M. WICKHAM,
WILLIAM PEPPER CONSTABLE,
JOSEPH M. HURT, JR.,
Counsel for Appellant.

APPENDIX

Chap. 104—An Act to Amend and Re-enact Section 2307 of the Code of Virginia, as Heretofore Amended.

Approved March 26, 1923.

1. Be it enacted by the General Assembly of Virginia, That section twenty-three hundred and seven of the Code of Virginia be amended and re-enacted so as to read as follows:

Section 2307. By whom property is to be listed; to whom taxed.—If property be owned by a person *sui juris,* it shall be listed and taxed to him. If property be owned by a minor, it shall be listed by and taxed to his guardian or trustee, if any he has; if he has no guardian or trustee, it shall be listed by and taxed to his father, if any he has; if he has no father, then it shall be listed by and taxed to his mother, if any he has; and if he has no guardian, nor trustee, father nor mother, it shall be listed by and taxed to the person in possession. If the property is the separate property of a person over twenty-one years of age or a married woman, it shall be listed by and taxed to the trustee, if any they have in this State; and if they have no trustee in this State, it shall be listed by and taxed to themselves. In either case, it shall be listed and taxed in the county or city where they reside; but if they be non-residents of Virginia, the property shall be listed and taxed in the county or city wherein such trustee resides. If the property be the estate of a deceased person, it shall be listed by the personal representative or person in possesion, and taxed to the estate of such deceased person. * * * If the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee in the county or city of his residence (except as hereinbefore provided) * * *

If the property consists of money, bonds, stocks, or other evidences of public or private debts in any county or city other than that of his residence, or State other than Virginia, it shall be listed by and taxed to the owner thereof; and it shall be the duty of the respective examiners of records of the several judicial circuits where the respective fiduciaries are appointed or qualified, to report to the respective commissioners of the revenues of the counties or cities in which said property is liable for taxation, all property held by said fiduciaries, to be taxed as provided by law. If the property be listed by and taxed to any person other than the owner, it shall not be delivered to the owner until the taxes thereon are paid or indemnity given to the person in possession, for the payment thereof.